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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

STEVEN KLEIN,

Defendant and Appellant.

D070409

(Super. Ct. No. SCE356943)

APPEAL from a judgment of the Superior Court of San Diego County, John M. Thompson, Judge. Affirmed.

Conrad Petermann, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Steven Klein was sentenced to prison for six years after a jury found him guilty of driving under the influence of alcohol (Veh. Code, § 23152, subd. (a)) and driving while having a measurable blood alcohol level of 0.08 percent or more (*id.*, § 23152, subd. (b));

and he admitted allegations he had a prior driving under the influence conviction within the prior 10 years (*id.*, §§ 23550, subd. (a), 23550.5, subd. (a)), a prior robbery conviction that qualified as a strike under the Three Strikes law (Pen. Code, §§ 211, 667, subds. (b)-(i)), and had served two prior prison terms (*id.*, § 667.5, subd. (b)). Klein filed a notice of appeal (*id.*, § 1237, subd. (a)), and his appointed counsel filed a brief summarizing the proceedings but urging no grounds for reversal (*People v. Wende* (1979) 25 Cal.3d 436 (*Wende*)). We find no reversible error and affirm the judgment.

FACTUAL BACKGROUND

On December 21, 2015, at 12:40 a.m., two officers of the California Highway Patrol (CHP), Gabriel Vidana and Frank Soto, observed Klein driving west on Interstate 8 at 85 miles per hour. The officers activated the emergency lights of their patrol car, pursued Klein, observed him weave in and out of traffic, and instructed him to exit the freeway and stop. After Klein complied with the instruction, Vidana exited the patrol car and approached Klein as Soto remained near the patrol car and observed the interaction. When Vidana arrived at Klein's vehicle, he smelled an odor of an alcoholic beverage emanating from Klein, saw sweat dripping from his face, and noticed his eyes were red and watery.¹ When Vidana asked Klein whether he had had any drinks earlier in the night, Klein responded, "A few drinks." Vidana placed Klein under arrest for driving

¹ According to his direct examination at trial, Soto also observed Klein's red and watery eyes at the time of the arrest. Initially on cross-examination, Soto further testified he had seen "[v]ery little" sweat on Klein's face and "could smell a little bit" of an odor of alcohol emanating from Klein. When pressed by Klein's counsel, however, Soto admitted that he had told the prosecutor that he never was close enough to Klein to observe the odor or the sweating.

under the influence and advised him he had to submit to a breath or blood test of his blood alcohol level. Klein opted for the breath test. At the police station, the breathalyzer reported Klein's blood alcohol level as 0.091 percent and 0.087 percent at 1:32 a.m. and 1:35 a.m., respectively. Vidana and a criminalist who worked for the San Diego County Sheriff's Regional Crime Laboratory and had 18 years' experience analyzing blood alcohol level test results both testified at trial that in their opinion Klein was driving under the influence of alcohol on the night of his arrest.

DISCUSSION

Klein's appellate counsel has filed a brief, pursuant to *Wende, supra*, 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738 (*Anders*), setting forth a statement of the case, urging no grounds for reversal of the judgment, and asking this court independently to review the record for error. Pursuant to *Anders*, counsel identified the following issues to assist the court in its search for error:

(1) Whether the trial court erred by denying Klein's motion to suppress evidence, which was based on insufficient grounds to justify a frisk for weapons at the time of arrest, and sought exclusion of all post-frisk observations of the arresting officer and the results of the breathalyzer tests;

(2) Whether trial counsel provided constitutionally ineffective assistance by failing to renew the motion to suppress after Soto gave testimony at trial about his observations of Klein at the time of the arrest that was inconsistent with Soto's prior statements;

(3) Whether the trial court erred by overruling Klein's objection to Vidana's testimony that Klein was driving under the influence of alcohol;

(4) Whether the trial court erred by not granting Klein's motion for mistrial, which was based on the prosecutor's violation of an in limine ruling that precluded questions about Klein's participation in field sobriety tests;

(5) Whether the trial court erred by overruling Klein's objection that the prosecutor misstated the burden of proof during closing arguments when he stated the jury must consider all of the evidence together in deciding whether there was a reasonable doubt about Klein's guilt; and

(6) Whether the trial court erred by denying Klein's post-verdict motion to substitute counsel, which was based on Klein's contentions that trial counsel had not adequately prepared a defense and had failed to make appropriate motions.

After receiving the opening brief from appellate counsel, we informed Klein he could file a supplemental brief. He submitted letters stating he declined to do so, because he had already filed a petition for writ of habeas corpus. In that petition, Klein raised some of the same issues listed by appellate counsel. We ordered the petition considered with the appeal, and dispose of the petition by a separate order filed in case No. D070954.

We have reviewed the record consistent with the requirements of *Wende, supra*, 25 Cal.3d 436 and *Anders, supra*, 386 U.S. 738; considered the issues listed by appellate counsel; and found no reasonably arguable grounds to reverse or to modify the judgment. Appointed counsel has represented Klein competently on this appeal.

DISPOSITION

The judgment is affirmed.

IRION, J.

WE CONCUR:

HALLER, Acting P. J.

PRAGER, J.*

* Judge of the San Diego Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.